United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

75-1388

To be argued by R. William Stephens
Time requested for argument, 20 minutes

IN THE

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

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DOCKET NO. 75-1388

UNITED STATES OF AMERICA,

Appellee,

v.

MAURICE BURSE,

Appellant.

BRIEF OF APPELLANT

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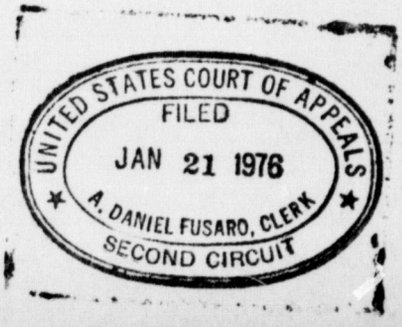

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POINT V - This court should reverse the conviction and dismiss the indictment of the defendant because the prosecutor used hearsay evidence when other evidence was readily available. Dismissal should be ordered under the supervisory power of the court and its long line of decided cases critizing the practice; it should also be ordered to protect the integrity of the judicial process in this circuit and because there is a high probability that if first hand testimony had been presented to the grand jury it would not have indicted the defendant. 31

a.) This court should dismiss this hearsay indictment. 35

b.) The dismissal of the indictment in this case is required to protect the integrity of the judicial process in this circuit. 42

c.) The indictment should be dismissed because there is a high probability that with first hand testimony the Grand Jury would have not indicted the defendant. 44

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IN THE

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

DOCKET NO. 75-1388

UNITED STATES OF AMERICA,

Appellee,

V.

MAURICE BURSE,

Appellant.

BRIEF OF APPELLANT

STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. Was it proper for the court to refuse the defendant's requested charge regarding the burden of proof respecting an "alibi" defense and to refuse to charge the

jury regarding Sections 3 and 4 of Title 18 United States Code?

2. Was the identification testimony of Mrs. Anna Debose the result of an impermissively suggestive procedure?

3. Was the prosecutor's summation proper?

4. Did the procedures followed by the Government deprive the defendant of a fair trial?

5. Should this court dismiss this hearsay indictment?

STATEMENT OF THE CASE

This is an appeal by the defendant Maurice Burse from a judgment of conviction entered on November 17, 1975 in the United States District Court for the Western District of New York (Curtin, C.J.). The judgment was entered upon a jury verdict returned on October 2, 1975, convicting the defendant-appellant of conspiring to rob a Federally insured bank in violation of 18 U.S.C. §371, as charged in count 1 of the indictment and finding the defendant not guilty of alleged violations of 18 U.S.C. §2113(b) charging the defendant with taking and carrying away with intent to steal and purloin the deposits of such a bank as alleged in count 2, and finding the defendant not guilty of an alleged violation of 18 U.S.C. §2113(a) charging the taking by intimidation from the person and presence of another, money in the custody of such bank as charged in count 3 of the indictment. The appellant was sentenced as a youth offender (18 U.S.C. §5006(e)) to the custody of the Attorney General pursuant to 18 U.S.C. §5010(b). The defendant-appellant was continued on bail pending appeal.

FACTS AND PROCEDURAL BACKGROUND

On July 30, 1974 the Lackawanna Ridge Road Branch of the Manufacturers & Traders Trust Company Bank was robbed of approximately $410.00 in cash by one Darrell Debose.

On August 28, 1974 the defendant-appellant Maurice Burse was indicted by a Federal Grand Jury sitting in the Western District of New York, in a three count indictment charging him with conspiracy under Section 371, Title 18 United States Code and with violations of 18 United States Code, Section 2113(b) and 2113(a). Darrell Debose was also charged in each count of the indictment.

THE PRETRIAL MOTIONS

The defendant moved for discovery and inspection under Rule 16 of the Federal Rules of Criminal Procedure (Record on Appeal 6, 10)* and moved for an order requiring the Government to turn over any arguably exculpatory matter contained in their

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* References to Record on Appeal refer to the original record docketed in the court and the number assigned to the document. References to "TR." refer to the trial transcript and "App." refers to the Appellant's Appendix.

files. The defendant also moved for an in camera inspection of the Grand Jury minutes to determine if the indictment was based on hearsay testimony and if so, whether the Grand Jury was mislead by the prosecutor into believing that they were receiving eye witness testimony rather than hearsay testimony (Record on Appeal 12). In either event, the defendant moved for dismissal of the indictment as being founded on hearsay testimony.* The response to these motions which were made before the United States Magistrate in the Western District pursuant to local practice was, that the Government denied that it had any Brady material in its files (Gov't. response of October 15, 1974, p. 7, Record 7 and Gov't. response of November 20, p. 2, Record 11), would not state whether the indictment was based on hearsay testimony (Record on Appeal 13) and took the position that the defendant was not entitled to discovery and inspection of the things requested. An affidavit in support of the motion stated on information and belief that the co-defendant Darrell Debose had advised the law enforcement officials of the Federal Bureau of Investigation that someone other than the defendant-appellant Burse had committed the bank robbery (Record on Appeal 12, Affidavit ¶5). The Government again denied the existence of any

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* This motion was renewed at the commencement of the trial and denied (TR. 12, 42-56).

material exculpatory of the defendant-appellant Burse stating "such conjecture is insufficient" (Record on Appeal 13, p.3) and that the "court is entitled to rely on the Government's representations".

The Magistrate, in a written memorandum (Record on Appeal 14), found that while the indictment was based on hearsay testimony, the Grand Jury was not mislead under United States v. Estepa, 471 F. 2d 1132 (2d Cir. 1972). The defendant also moved before the Magistrate for the Government to set forth any additional statutes on which the Government intended to rely at the time of trial (Record on Appeal 10, ¶10). In response, the Government did not name any additional statutes and further stated that if any, the Government "so will provide" (Record on Appeal 11, Gov't. response of November 20, 1974, p. 3).

The defendant-appellant then filed a motion with the District Court for a hearing to determine whether or not impermissively suggestive procedures were used in displaying photographs to witnesses in the case (Record on Appeal 15). The prosecution resisted (Record on Appeal 16, Gov't. response of January 29, 1975) such a hearing and on the return date for the motion, the court inquired of the prosecutor whether or not there

were witnesses who had been shown such photographs and the Assistant United States Attorney stated that he did not know how many witnesses reviewed photos, but that they were all local people and the court ordered a hearing to be held (TR. of Proceeding February 18, 1975, pp. 2-3).

The hearing was held on March 19, 1975 and one witness, Barbara Ramos was produced. The court held after a hearing, that the manner of presenting the photographs was not impermissively suggestive (Appendix C).

THE TRIAL

The case came on for trial on September 23, 1975. The principal witness against the defendant was the co-defendant Darrell Debose who testified that the defendant Burse accompanied him into the bank on the day of the robbery and stood in the bank while he, Debose approached the teller and robbed her. The Government additionally produced one Evon Wright who testified that the defendant-appellant Maurice Burse was at her apartment in the early morning of June 30, 1974 and in the later morning of June 30, 1974 accompanied by two other men including the co-defendant Debose whom she knew only as "Spider".

The Government called other witnesses including Barbara Ramos who testified that she saw the defendant Maurice Burse running in the neighborhood of the bank on the day of the robbery with another person. She stated, however, that she did not know (TR. 560) whether the shorter of the two men could have been Gary Green, a picture of whom was displayed to her and she further stated "I am not that sure" (TR. 551) if it was the defendant Burse.

The mother of the co-defendant Darrell Debose testified that two men came to her house on a Tuesday in the summertime of 1974 and one of them whom she had not seen before was the defendant-appellant Burse who she said was introduced to her as "Marie" (TR. 235). She further testified that it was the defendant seated in the courtroom who was one of the persons (TR. 235-237).

CASE FOR THE DEFENDANT AND THE RELATIONSHIP AMONG THE GOVERNMENT WITNESSES

In order to be fully aware of the prejudice resulting to the defendant from the improper methods used by the prosecution in this case, it is necessary to fully understand the situation disclosed by the record with respect to the position

of the defendant and the relationship between the various witnesses who testified against the defendant who testified for the Government.

The defendant-appellant, Maurice Burse, has nine brothers and sisters (587). He is the third of the ten children and has six brothers (587). There was substantial evidence in the record that the physical resemblance among the brothers is substantial. (Testimony of Evon Wright 500, 502; Testimony of Patricia Burse, 589, 592; Testimony of Louise Stevens, 640; Testimony of Craig Burse, 682-683).

The Government witnesses testified that it was the defendant's brother Kenneth Burse, who arranged with Evon Wright for the use of her apartment on the morning of July 30, 1974 (483). There was further testimony from the Government witnesses that the defendant's brother was present in Evon Wright's apartment on that morning (483, 502, 503, 506, 507, 518-519) both before and after the robbery. Evon Wright was admittedly a very close friend of the defendant's brother, Kenneth Burse (497, 641). The record is replete with testimony that on hundreds of occasions the defendant's brother, Kenneth Burse, had spent the night in Evon Wright's apartment (498, 594-595, 616, 641). Although it was the testimony of the Government's witnesses that Evon Wright

did not know the co-defendant Darrell Debose, the evidence indicated that when he was at her apartment on July 30, 1974 she told the F.B.I. agents that he was her boyfriend (529), had been in the apartment all night with her and all morning (492, 577). Evon Wright admitted that she lied to the F.B.I. agents (529) and that before Darrell Debose left the apartment on that day he paid her $10.00 (512). The stolen money consisted in part of bait money contained in a packet of $10.00 bills (566-7, Gov't. exhibits 11-1 and 11-2) and the testimony of Debose was that he was required to borrow bus fare from his co-conspirator to finance travel to Lackawanna (389, 475). It was Debose's testimony that the money was not divided at Evon Wright's apartment after the bank robbery (373). Evon Wright denied any knowledge of the bank robbery (513).

Mrs. Barbara Ramos testified that she saw two men run past her and she saw their faces for a second or two (558). She testified that the shorter of the two was Maurice Burse* but upon

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* Darrell Debose, the principal witness against the defendant-appellant is approximately 6'4" in height, very thin and lanky, which, taken together with his previous background including considerable number of arrests for muggings, burglaries and robberies, probably accounts for his nickname "Spider".

being shown a picture of Gary Green, an unindicted co-conspirator*, she stated she did not know if he was the man who accompanied the taller of the two that ran past her (560) and further testified "I am not that sure" (551) when asked of her certainty of her identification of the defendant Burse.

Another witness for the Government, the mother of Darrell Debose testified that Gary Green and another person whom she had not seen before came calling at her house for her son Darrell one morning in the summer of 1974. She testified that this other person was introduced to her as "Marie" (235) and that it was the defendant, Maurice Burse (235-237). On cross-examination she was asked if anyone had shown her pictures (247). She stated that F.B.I. agents had shown her a picture of her son Darrell robbing the bank and she had identified the person in the picture as being her son. She further testified that she was shown two other pictures and asked if she could identify them (571-582).

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* Gary Green was a juvenile and was charged in an information as being such. He was found guilty by the Federal Court. He was arrested within two days after the robbery of the bank while he was engaged in another robbery and was found to possess a number of the $10.00 bills included in the bait money of the teller's drawer (566-567).

She told the person that she did not know the persons in the other two pictures (575). Whereupon she stated that the F.B.I. agent told her that they were pictures of Gary Green and Maurice Burse who had helped her son rob the bank (575-581).

The fact that Mrs. Debose had been shown a photograph of the defendant had not been disclosed to the defense in response to a motion for a photographic hearing.*

Based upon the foregoing, it was the position of the defendant-appellant, Maurice Burse that both Evon Wright and the co-defendant, Darrell Debose were testifying that it was Maurice Burse who had joined with Green and Debose to rob the bank in order to protect Kenneth Burse. It was further the defendant-appellant's position that Darrell Debose testified about the division of money later in Buffalo in order to avoid implicating Evon and Kenneth in the bank robbery. The defendant further claimed that Mrs. Ramos and Mrs. Debose had mistakenly identified Maurice Burse and that the testimony of Mrs. Debose was the result of the impermissably suggestive statement of the

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* Nor had the fact that she failed to identify the defendant's picture been disclosed in response to the request for Brady material.

of the F.B.I. agent that it was Maurice Burse and Gary Green who were with her son Darrell robbing the bank (TR. 575-581 see also 247-269).

The defendant called three witnesses. Louise Stevens, a next door neighbor of the defendant testified that on returning to her home from Buffalo that morning, she passed the bank which had police cars around it (TR. 642) and when she got home she saw Maurice "raking the yard" and told him the bank had been robbed (TR. 643). She testified that she estimated the time at quarter after eleven (TR. 648, 658) and that she was sure she saw him on the same day she went by the bank (TR. 662). Patricia Burse, the mother of the defendant, testified that on the morning of the bank robbery, Maurice was raking in the yard (TR. 595) and that he was inside and outside the house during the morning (TR. 607), from 9 until noon (TR. 609). Craig Burse, the defendant's brother, testified that he and his brother Jerome played basketball at the Friendship House and that Maurice Burse does not (TR. 681).* Craig further testified that between 9:20 A.M. and

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* Barbara Ramos had testified that she remembered Maurice Burse, the defendant, from playing basketball at the Friendship House (TR. 547).

the time he learned of the bank robbery when Maurice came into the house and told his mother, Maurice was "in the yard cleaning up" (Tr. 685) and that Maurice was home on that morning (TR. 698).

The defendant further introduced into evidence the films taken by the surveillance cameras in the bank which showed no picture of the defendant, Maurice Burse, although the principal witness against Burse, Darrell Debose, the bank robber, had testified and marked on Government Exhibit 3 the position of Maurice Burse directly in front of a bank surveillance camera.

PRELIMINARY OBSERVATION

With respect to the issues raised by this case, we must note at the outset the comments of Chief Judge Curtin after the case was tried that the government had engaged in "cutesy tricksies" [sic] (TR. 910 App. H); that "we can all agree that the evidence in the case is not overwhelming against Mr. Burse. I think it is a case where the jury could have easily voted up or down on the evidence presented here". (TR. 952, App. I); that "hearsay testimony" was presented to the Grand Jury (TR. 956, App. I); that with respect to Brady material the prosecution did not "observe[d] even the letter of the rule" (TR. 935, App. H); that on pretrial motions the answer of the government was a "fuzzy wattling [sic, waffling?] one" (TR. 962, App. I); that this case presented "a most troublesome situation" (TR. 971, App. I) and that the arguments of the defendant are "very strong arguments . . . but . . . it seems to me that . . . the arguments should be made with the Appellate Court." (TR. 973, App. I).

ARGUMENT

POINT I

It was error to fail to charge the jury the requested "alibi" instruction.

The only witness who testified that the defendant Burse had conspired with him to rob the bank, was the co-defendant Debose, who had pleaded guilty to conspiracy. Debose admitted to telling lies on numerous occasions in order to avoid punishment or to mitigate the punishment he was to receive (TR. 395, 398, 400, 450, 451, 453, 454, 466, 468, 469 and 476). He admitted that he would "not hesitate to lie to avoid going to jail" (TR. 399). He admitted that he "would rather be shot than go to jail for ten years" (TR. 401) and further admitted that he "would rather be dead than be in jail for ten years' (TR. 402). He marked on Government Exhibit 3 the position in the bank where he claimed the defendant Burse was standing with an initial "B" (TR. 367). The position was directly in front of a surveillance camera of the bank that was in operation at the time of the robbery (See Gov't. Exhibit 3). The surveillance cameras of the bank, however, did not contain the picture of the defendant Burse. The defense witnesses testified that Burse was in the yard raking leaves the morning the bank was robbed (See discussion above).

The defendant requested the standard instruction regarding the burden of proof with respect to a "alibi" defense (See defendant's Request to charge No. 19, Appendix E and compare with Federal Jury Practice and Instructions, Devitt and Blackmar §11.31). The Court originally refused to charge Request No. 19 (TR. 733, Appendix D). After the trial court had so ruled, the Assistant United States Attorney stated "We have no objection to some charge from your Honor using the terminology 'alibi'." (TR. 735, Appendix D). The court then on two occasions, indicated that he would give the alibi instruction (TR. 735, Appendix D). The court nevertheless refused to give an alibi instruction and an exception was specifically taken as follows:

> "We further except specifically to the failure of the court to charge the request on alibi taken from the pattern jury instructions which points out to the jury that even with respect to the alibi witnesses, if they don't believe them that that burden of proof still stays with the Government."
> (TR. 835-36, Appendix F).

The defendant specifically requested the instruction, and excepted to the court's failure to give the instruction. The failure to give the instruction regarding alibi was further

compounded by the fact that the prosecutor misrepresented the testimony of one of the alibi witnesses, Louise Stevens (See TR. 39-41, Summation of Assistant United States Attorney, Appendix G). This misrepresentation was so blatant that the trial judge on his own, interrupted and instructed the jury with regard to the issue (TR. 40-41, Appendix G).

Although it has been held that in the absence of a failure on the part of the defendant to request an alibi instruction, the court need not give one, Goldsby v. United States, 160 U.S. 70, 77 (1895); Holm v. United States, 325 F. 2d 44 (9th Cir. 1963), the failure to give the instruction as requested and when not given a specific exception being taken, was error, United States v. Marcus, 166 F. 2d 497 at 504 and cases cited therein (3d Cir. 1948) holding that indeed, it was the court's duty to itself compose and give a proper instruction on the subject.

It was also error for the court to refuse to take judicial notice of and instruct the jury regarding §3 and §4 of Title 18 United States Code as requested in defendant's Request No. 12 (Appendix D).

There was considerable testimony from the witness Evon Wright that the defendant's brother Kenneth Burse was present in her apartment, both before and after the bank robbery (TR. 483, 502, 506, 507, 518-519). Evon Wright testified that she knew nothing about the bank robbery. Yet she admitted that she lied to the F.B.I. agents when she said that Debose had been in her apartment all night and all morning (TR. 517). Debose testified that Evon Wright knew of the bank robbery (TR. 465-466). It was the claim on behalf of the defendant, that Evon Wright was structuring her testimony so as to avoid being charged either as an accessory after the fact under Title 18 United States Code §3, or misprison of felony under Title 18 United States Code §4. The court refused to charge the requested instruction 12 (TR. 729-730, Appendix D). On behalf of the defendant, we specifically requested the court to "take judicial notice of the statutes contained and referred to in 12" (TR. 730, Appendix D). The court stated: "That has already been admitted in evidence" (TR. 730) and on behalf of the defendant it was pointed out that "The only thing is the jury has never been told how the statute reads and even though I may argue that the particular witness from her testimony could be guilty of violating section 3 or section 4 of Title 18, the jury won't be able to determine that unless they hear from

you what that section says" (TR. 731, Appendix D). The court refused to charge the words of the particular sections and an exception was taken (TR. 731, Appendix D). This was error and severely prejudiced the defendant because the jury could not adequately know the motivation of the witnesses referred to unless they knew the substance of the criminal charges that could be made against them.

POINT II

The testimony of Mrs. Anna Debose identifying the defendant Burse should not have been allowed because it was the result of an impermissively suggestive procedure used by the F.B.I.

We have previously detailed the testimony of Mrs. Anna Debose who identified the defendant Burse as being at her home calling on her son sometime in the summer of 1974. We have also pointed out that we moved for a hearing regarding photographic identification procedures and only one witness was produced, Barbara Ramos. Anna Debose testified that the F.B.I. agents in this case showed her three photographs (TR. 571). She identified the one picture as being that of her son. She could not identify the other two pictures. She testified that the F.B.I. agent told her that these are the boys were with Darrell (TR. 575-6) that he told her the names (TR. 578) and that "they [F.B.I.] said they robbed the bank" (TR. 578) and further "that what he [F.B.I. agent] said it was, I have to go by what he [F.B.I. agent] say" (TR. 581-582).

When this developed, we promptly moved that the testimony of Mrs. Debose be stricken and the jury instructed to disregard it (TR. 302-305). We also moved for a mistrial on the grounds of prejudice (TR. 303). The court denied the motions (TR. 304). The court stated "I don't think that it is clear now that the procedure used was impermissively suggestive." (TR. 302). The court apprently chose to believe the agent's testimony that he had not shown any pictures (TR. 281-302). This was completely against the weight of the believable testimony.

The testimony of Mrs. Debose identifying the defendant-appellant was the result of an impermissively suggestive procedure as a matter of law. See Simmons v. United States, 390 U.S. 377 (1968). Here the display of the single photograph of the defendant Burse and after the witness failed to identify him, a statement by the agent that he had helped her son rob the bank, was the type of situation to which Simmons v. United States, supra specifically applies. In Simmons the court stated that the photographs should be handled in such a way so as to present to the witness a choice "without indicating whom they suspect". 390 U.S. at 383. The court also stated that a single individual should not be "in some way emphasized". Each case of course,

must be judged on a case by case basis and by the totality of the circumstances, see Foster v. California, 394 U.S. 440 (1969) and U.S. ex rel Cannon v. Montanye, 486 F. 2d 263 (2d Cir. 1973); see also United States v. Yanishefsky, 500 F. 2d 1327 (2d Cir. 1974). Indeed, this Court has recently expressed the opinion that "A spread of ten photographs might be preferable" United States v. Boston, 508 F. 2d 1171 (2d Cir. 1974).

If the United States Attorney had made the inquiries which the cases require him to make after our motion regarding photographic identification, a hearing could have been held before trial. It was not until the witness had almost completed her testimony that the impermissively suggestive procedure was uncovered and the jury escorted from the courtroom so that testimony could be taken regarding the facts as related by the witness (TR. 247 and following).

POINT III

The summation of the Assistant United States Attorney was improper.

The trial court observed on defendant's motion for a new trial "The evidence in this case is not overwhelming against

Mr. Burse." (TR. 952, Appendix I). In this close case, the Assistant United States Attorney made repeated and substantial prejudicial comments in his closing argument. We cite of course, the landmark case of Berger v. United States, 295 U.S. 78 (1935) setting forth the duties and obligations of prosecutors in a case which was "not strong" (295 U.S. at 88) and the admonition of the Supreme Court of the United States in Berger that:

> "In the circumstances prejudice to the cause of the accused is so highly probable that we are not justified in assuming its non-existence."
> (295 U.S. at 89).

This Court has repeatedly dealt with closing arguments of prosecutors alleged to have been prejudicial. See United States v. Drummond, 481 F. 2d 62 (2d Cir. 1973); United States v. White, 486 F. 2d 204 (2d Cir. 1973) and United States v. Bivona, 487 F. 2d 443 (2d Cir. 1973).

The summation of the Assistant United States Attorney is 47 pages in length and is completely reproduced in defendant's Appendix at G. In this case, we also have the comments of the trial court with respect to the improper remarks made by the prosecutor when we brought these matters to the trial court's attention on our motion for a new trial. These materials are

completely reproduced in defendant's Appendix at H at pages 902 through 929.

The prosecutor attempted to mislead the jury in his closing argument that its principal witness was confined in the Erie County Jail on Federal charges (TR. summation 7). This was not so (See docket entries, Appendix A that Debose had posted bond on August 14, 1974). Thereafter, an appeal to the jury was made to convict the defendant because the number of bank robberies in the area was increasing (TR. summation 17). The prosecutor sought to comment on the defendant's failure to take the stand by stating "The defendant didn't tell you about all the truths" (TR. summation 25). He then sought to refer to a statement of the principal witness which was not inevidence (TR. summation 26). He incorrectly sought to state the testimony of Barbara Ramos (TR. summation 29, 34-35) and then appealed to the jury to convict the defendant on the basis of conjecture, speculation and surmise in attempting to explain the absence of the defendant's picture from the surveillance films (TR. summation 36 and 37). He then misrepresented the testimony of one of the defendant's alibi witnesses, Mrs. Stevens (TR. summation 39) prompting interruption by the trial judge and then made a completely improper argument regarding what defendants generally in criminal

cases do (TR. summation 41).

In each and every instance an objection was promptly taken by defense counsel and in some cases the court attempted to give cautionary instructions. We believe that the closing argument of the United States Attorney speaks for itself and only invite the court to read this argument in order to become convinced of the merits of this point of appeal.

POINT IV

The procedures followed by the Government in this case denied the defendant a fair trial.

We treat under our next point the fact that the indictment in this case was obtained wholly on hearsay testimony. Additionally, it is undisputed that in this case the Government's principal witness Debose, originally told the F.B.I. that a man named Jimmey Barner robbed the bank and such fact was never disclosed to the defense inspite of two motions for production of Brady material. This statement was only turned over, pursuant to the direction of the trial judge, after the jury had been selected (TR. 14-16). Moreover, in spite of the defendant's motion to suppress, based on impermissively suggestive photographic

identification procedures, the defendant did not become aware of the circumstances and facts relating to the identification testimony of Mrs. Anna Debose until she had already testified before the trial jury (See Point II above). Although we filed a motion regarding the photographic procedures in January of 1975, apparently the United States Attorney failed to make inquiries in response to that motion (TR. 292-293). Certainly, the defendant could have better attacked the identification of Mrs. Anna Debose if it had known of the impermissively suggestive procedure used by the Federal Government before she testified instead of discovering it in midstream. Additionally, we cite all of the remarks of the Government Attorney in his closing argument to which objections were taken. Additionally, and another instance cumulative on this point, is the question posed by the prosecutor of the defendant's witness, his brother, Craig Burse, attempting to imply that he was required to report to the Lackawanna Police Department that his brother was home on the date he was alleged to have committed the crime (TR. 700). *

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* We deem it appropriate to point out in a footnote that in addition to the other conduct complained of the Assistant United States Attorney engaged in the unusual practice of subpoenaing witnesses to his office on days which had not been set down by the court for a trial of this case.
(Continued on following page)

The stark fact remains that all of these condemned procedures were used in this case to the detriment and the prejudice of the defendant!

We do not know if the Government failed to turn over other Brady material. The entire investigation has been sealed and filed with the court as court Exhibit 28. We request the court to review the materials contained therein to determine if additional Brady material was not turned over to the defense. Since it was the Government's position that the defendant-appellant Burse participated in the bank robbery by standing in the bank while co-conspirator Debose actually approached and

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* (Continued from preceding page)

The record discloses (TR. 24-38) that the Assistant United States Attorney issued scores of subpoenas, 14 of them returnable on a date which had not been set down by the court for the trial of this case. In some instances, subpoenas were issued returnable "forthwith" on a day when the case had not been scheduled for trial (Record 32 and 37) directing the witnesses to call his office and thereafter interviewing them.

This case was set down for trial on Tuesday, September 23. Nevertheless, the United States Attorney knowing full well that the case was not scheduled for a Monday, subpoenaed many witnesses in the traditional language "You are commanded to appear and testify. . ." and made these subpoenas (Record 30) September 19 in two cases (Record 31)(forthwith) and September 22 in five cases (Record 33 and 37).

We know of no authority holding the United States Attorney has the power to subpoena prospective witnesses in a criminal case to his office. If he has such power we are certain that

(Continued on following page)

robbed the teller, we submit that any material contained in the investigation file which indicated that witnesses present at the time of the robbery saw only one participant, such material and the names of such witnesses should have been turned over to the defense. Such evidence would have been devastating to the prosecution's claim that there were three participants in the robbery and would have completely undermined the credibility of its principal witness Debose.

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* (Continued from preceding page)

the defense attorney does not and to the extent that the prosecution has a means available to it of interviewing witnesses prior to trial, that is not available to the defense, we submit it is a denial of equal protection of the laws.

Judge Curtin agreed that the prosecution had no authority to either subpoena witnesses to the offices of the United States Attorney or in the absence of a court order, to issue "forthwith subpoenas". Judge Curtin stated:

> "I believe that Mr. Stephens has a point, tha' without any trial setting whatever that the United States Attorney simply does not have the right to subpoena witnesses to have them come into the office." (TR. p. 28)

Judge Curtin also stated:

> "Forthwith subpoenas should not be issued unless there is a very unusual circumstance and only with the approval of the court." (TR. p. 32)

When the United States Attorney continued to protest, attempting to justify this unusual practice, Judge Curtin said:

> "I am telling you do not use forthwith." (TR.p.32)
> (See TR. 24-38)

The cumulative effect of all of this, deprived the defendant of a fair trial by denying him what Federal Courts have held to be basic safeguards.

POINT V

This court should reverse the conviction and dismiss the indictment of the defendant because the prosecutor used hearsay evidence when other evidence was readily available. Dismissal should be ordered under the supervisory power of the court and its long line of decided cases critizing the practice; it should also be ordered to protect the integrity of the judicial process in this circuit and because there is a high probability that if first hand testimony had been presented to the grand jury it would not have indicted the defendant.

On July 30, 1974 the Ridge Road Office of the Manufacturers & Traders Trust Company in Lackawanna, New York was robbed. On August 28, 1974 a Grand Jury sitting in the Western District of New York handed up an indictment charging the defendant-appellant, Maurice Burse and one Darrell Debose, in three counts alleging a violation of the Conspiracy Statute 18 U.S.C. §371 and further charging both with violations of 18 U.S.C. §2113(b), taking and carrying away money in the custody of the bank and 18 U.S.C. §2113(a), taking by intimidation from the person and presence of the bank teller money in the custody of the said bank. The defendant-appellant moved to dismiss the indictment on the grounds that it was based on hearsay testimony, both before the Magistrate and before the District Court prior

to trial. The defendant-appellant also moved for an in camera inspection of the Grand Jury minutes by the Magistrate, to determine if the prosecutor had violated the rules set forth in United States v. Estepa, 471 F. 2d 1132 (2nd Cir. 1972). Both the United States Magistrate and the District Court Judge inspected the Grand Jury minutes in camera and denied the motion.

Although the defendant-appellant has never been allowed to inspect the Grand Jury minutes, by either the Magistrate or the District Court, either before or after trial, from the proceedings before the District Court and because certain portions of the Grand Jury minutes were turned over to counsel after selection of the jury, we are able to reconstruct the witnesses who testified before the Grand Jury and the substance of their testimony.

As near as the defendant-appellant is able to determine the Grand Jury heard three witnesses before returning this indictment: Christopher Henderson, a security officer for the M & T Bank who was not present in the Ridge Road Office when the robbery occurred; Linda Giles, who was present in the area of the bank on the day it was robbed and saw persons running from the bank who she was unable to identify; and special agent of the Federal Bureau of

Investigation, Thomas J. Colombell.

Neither the witnesses Christopher Henderson, nor Linda Giles implicated the defendant-appellant, Maurice Burse in any way in their testimony before the Grand Jury.

Although the defendant-appellant has not been furnished with a copy of special agent Colombell's testimony before the Grand Jury, Judge Curtin in our motion to dismiss the indictment, made and renewed at the beginning of the trial, characterized his testimony as follows:

> "There was testimony from an F.B.I. agent, Thomas J. Colombell, and Mr. Colombell took a statement from a Darrell Debose and he described the statement to the Grand Jury. Mr. Debose admitted his implication in the bank robbery to Mr. Colombell and in the written statement he said that there were two other individuals involved. Orally, he told, according to Mr. Colombell, he told Mr. Colombell that the other two individuals involved were Gary Green and the present defendant in this case, Maurice Burse. No question about it, the hearsay, in fact, you might say double hearsay as far as the Grand Jury is concerned." (TR. 45)

From other facts available in this case it is undisputed that special agent Colombell had two interviews with the co-defendant Debose on August 8, 1974. During the first of these interviews

Mr. Debose denied any involvement in the bank robbery, stated that he had no knowledge of the bank robbery, but said that he did know who committed this robbery and gave the name of Jimmey Barner (See 302 interview of Darrell Debose of August 8, 1974 by special agents Colombell and Davidson, Government Investigation File p. 73 and 74). In a later interview that day by the same special agents of the F.B.I., Mr. Debose admitted his involvement in the bank robbery, confessed that he had done it and signed a written statement that he had robbed the bank along with two others who were unnamed (See court Exhibit 17).

Thus, the only evidence involving the defendant-appellant, Maurice Burse with the bank robbery, was the testimony of special agent Colombell that Darrell Debose had told him orally that Maurice Burse was one of the persons who had robbed the bank with Darrell Debose.

We are unable to state through what means the special agent or the Assistant United States Attorney was able to explain to the Grand Jury the reason for the failure of Mr. Debose to name the defendant-appellant, Burse in the written statement. Nor are we able to state why the Grand Jury did not indict one Jimmey Barner if Mr. Debose had also advised special agent Colombell as

indicated in the 302 Report that he had robbed the bank.*

a.) This court should dismiss this hearsay indictment.

Elsewhere in this brief we urged that the conviction must be set aside and a new trial ordered for among other things, the failure of the prosecution to turn over Brady material (See Point IV , p. 26), the improper closing argument of the prosecutor (See Point III , p. 23), and the failure of the court to charge a "alibi" charge to the jury (See Point I , p. 16).

Here we urge that this court because of its repeated and successive warnings to prosecutors over a period of the last ten years and because of its most recent pronouncements over the past six years, this hearsay indictment should be dismissed under this

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* If it should appear from an inspection of the Grand Jury minutes which have been sealed for purposes of review in this court that special agent Colombell did not disclose to the Grand Jury that Debose had told him that Jimmey Barner had robbed the bank, then we claim that the indictment should be dismissed for the failure of the prosecutor and the special agent to make a complete disclosure to the Grand Jury of all the names that Mr. Debose had advised the special agent were involved in the bank robbery. (Court Exhibit 29)

Additionally, if special agent Colombell testified before the Grand Jury that the F.B.I. determined that it was the defendant Burse who was involved with Debose in the bank robbery without setting forth how such a determination was made, we claim that that would be additional grounds for dismissing this hearsay indictment.

Court's supervisory powers over United States Attorneys in this Circuit. See United States v. Borelli, 336 F. 2d 376 (2nd Cir. 1964); United States v. Payton, 363 F. 2d 996 (2nd Cir. 1966)(dissenting opinion); United States v. Beltram, 388 F. 2d 449 (2nd Cir. 1968)(dissenting opinion); United States v. Umans, 368 F. 2d 725 (2nd Cir. 1966); United States v. Catino, 403 F. 2d 491 (2nd Cir. 1968); United States v. Arcuri, 405 F. 2d 691 (2d Cir. 1968) and United States v. Estepa, 471 F. 2d 1132 (2nd Cir. 1972).

More than twelve years ago this Court stated:

> "The Government ought not to be allowed, by having its principal witness speak to the Grand Jury through the voice of another, to deprive a defendant of his right to impeach by contradiction."
>
> United States v. Borelli, 336 F. 2d 376 at 391 (2nd Cir. 1964).

Two years later in a dissenting opinion, then Circuit Judge Friendly stated:

> "The course followed by the Government in this case makes a mockery of the Fifth Amendment's guarantee . . ."
>
> United States v. Payton, 363 F. 2d 996 at 999 (2nd Cir. 1966).

This Court, issued the first of a long series of warnings to prosecutors that:

> ". . . excessive use of hearsay in the presentation of government cases to grand juries tends to destroy the historical functions of grand juries in assessing the liklihood of prosecutorial success and tends to destroy the protection from unwarranted prosecution that grand juries are supposed to afford to the innocent. Hearsay evidence should only be used when direct testimony is unavailable or when it is demonstrably inconvenient to summon witnesses able to testify to facts from personal knowledge."
>
> United States v. Umans, 368 F. 2d 725 at 730 (2d Cir. 1966).

In United States v. Beltram, Circuit Judge Medina in a dissenting opinion, recalled the past practices in Federal Courts frustrating defense counsels' attempts to secure Grand Jury minutes for purposes of cross-examination. He pointed out that:

> ". . .in a more enlightened age, it is thought more consistent with the accused's rights to defend himself to permit his counsel, generally as a matter of course, at least in this Circuit, to see the Grand Jury testimony of trial witnesses . . ."

He then posed the remarkably devastating query:

> "What is the use of such a practice, established in the cause of truth and justice, if the prosecutor can in effect return to the old system by the simple expedient of withholding key witnesses from the Grand Jury hearing?"
> 338 F. 2d 449 at 452

In United States v. Catino, 403 F. 2d 491 at 496-7 (2nd Cir. 1968) this Court quoting from Umans, stated: "We adhere to this view." and declined to dismiss the indictments because they were returned less than a week after the Umans decision and to do so "would be an unduly harsh exercise of supervisory powers".

The indictment in this case was returned seven years and ten months after the decision in Umans (Umans decision October 27, 1966 - Indictment in this case August 28, 1974).

In United States v. Arcuri, 405 F. 2d 691 at 694 (2nd Cir. 1968) this Court noted that the practice of obtaining hearsay indictments was no longer the policy of the United States Attorneys in the Southern District or the Eastern District (See U.S. v. Arcuri, 282 F. Supp. 347 (E.D.N.Y. 1968)) and the Court affirmed the conviction, but stated:

> "We repeat, however, the warnings to prosecutors given in Umans and Catino." (Emphasis added.)(405 F. 2d 691 at 694)

District Judge Weinstein in what this Court termed a "penetrating opinion" (405 F. 2d at 693), analyzed the "pernicious" practice of relying on hearsay rather upon the testimony of eye

witnesses. He pointed out that Grand Jurors are unable to distinguish between prosecutions which are strong and those which are weak and thus "cannot exericse its judgment in refusing to indict in weak cases, where, technically, a prima facie case may have been made out." United States v. Arcuri, 282 F. Supp 347 at 349 (E.D.N.Y. 1968). Judge Weinstein also traced the development of allowing defense counsel access to the trial witnesses Grand Jury testimony as laid down by this Court in United States v. Youngblood, 379 F. 2nd 365, 367, 370 (2nd Cir. 1967) and later statutorily made a part of federal practice in the Jenks Act 18 U.S.C. §3500. He also pointed out that the return of the indictment avoids the preliminary hearing to which the defendant is otherwise entitled. See Sciortino v. Zampano, 385 F. 2d 132 (2nd Cir. 1967).

Both "pernicious" effects are present in this case. Here, no witness who testified before the Grand Jury was present at the Ridge Road Office of the M & T Bank when it was robbed. No witness who testified before the Grand Jury could identify the defendant-appellant as having participated in the bank robbery. The teller, Mrs. Jurek testified at the trial, was not called as a witness before the Grand Jury. Mrs. Barbara Ramos who testified that she thought the defendant-appellant ran past her, who testified

at trial, did not testify before the Grand Jury; Evon Wright, who testified at trial, did not testify before the Grand Jury and Mrs. Debose, who also testified at trial, did not testify before the Grand Jury. All of these witnesses resided in the City of Buffalo or the City of Lackawanna, a contiguous municipality and were available to testify at the Federal Courthouse which is only a 20 minute drive away.

Thus, by 1972 this Court had issued many "warnings to prosecutors". Nevertheless, its "warnings" were apparently more honored in the breach than in the observance. In United States v. Estepa, 471 F. 2d 1132 at 1135 and following (2d Cir. 1972) this Court pointed out that it had:

> ". . . previously condemned the casual attitude with respect to the presentation of evidence to a grand jury manifested by the decision of the Assistant United States Attorney to rely on testimony of the law enforcement officer who knew least rather than subject [others] to some minor inconvenience".

and pointed out that the framers of the Bill of Rights "were not engaging in a mere verbal exercise" incorporating the Fifth Amendment to the Constitution. This Court then stated:

> "We had hoped that, with the clear warnings we have given to prosecutors

". . . and the assurances given by United States Attorneys . . . a reversal for improper use of hearsay before the grand jury would not be required." (Citations omitted).

This Court then concluded:

"We cannot, with proper respect for the discharge of our duties, content ourselves with yet another admonition; a reversal with instructions to dismiss the indictment may help to translate the assurances of the United States Attorneys into consistent performance by their Assistants."

This decision was 20 months before the indictment in this case.*

The United States Attorney in this case consistently has cited Costello v. United States, 350 U.S. 359 (1956) whenever we have brought up the question of the hearsay indictment. But Costello was cited many times by this Court in issuing its warnings and admonitions. It does not seem to be too much to require that the Assistant United States Attorney be familiar with

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* For further evidence of the "casual attitude" (United States v. Estepa, 471 F. 2d at 1135) of the United States Attorney for the Western District of New York regarding the presentation of evidence to Grand Juries in the Western District, see United States v. Daneals, 370 F. Supp. 1289 (W.D.N.Y. 1970) wherein the United States Attorney in the Western District of New York saw fit to indict 153 separate selective sercice cases within a spact of three days. The manner of such presentations is enlightening.

this Court's pronouncements on the subject in the exercise of its supervisory powers of the most recent ten years rather than a case decided twenty years ago. The United States Attorneys at the Western end of the Second Circuit should, we submit, have a "proper respect for the discharge of [their] duties" and be required to heed this Court's warnings and admonitions.

The indictment should be dismissed.

b.) The dismissal of the indictment in this case is required to protect the integrity of the judicial process in this circuit.

No one would have the temerity to contend that defendants in the Western District of New York have less rights with respect to the nature of an indictment which may be returned against them than those in the Southern District or the Eastern District. Yet the effect of an affirmance here would have such an effect and would encourage those charged with the responsibility of prosecuting crime in the Federal Courts in the circuit from giving less than full compliance with the long line of cases cited above. If the opinions of this Court laboriously prepared and diligently circulated to both District Judges and United States Attorneys' offices in this circuit can be treated in such a cavalier fashion, the integrity of the judicial process will be

seriously undermined and this Court's exercise of its supervisory powers severly diminished, cf. United States v. Liebowitz, 420 F. 2d 39 at 42 (2d Cir. 1969). Only this Court can determine whether or not the suggestions, warnings, admonitions and other points of law incorporated into its judicial pronouncements will be heeded by those to whom they are directed.* A judicial process which issues such warnings and admonitions without the intent of granting sanctions when they are ignored, will have a difficult time in obtaining consistent performance by those it supervises.

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* We are after all talking about a bank robbery in this case. It is difficult to concieve of a criminal action more susceptible to proof of fact witnesses than the robbing of a federally insured bank. Costello v. United States, 350 U.S. 359 (1956) was a tax prosecution where "there was excellent reason for limiting the presentation to the three agents who summarized financial evidence, proof of which required 141 other witnesses and 368 exhibits at the trial, and the agents' lack of direct knowledge must have been apparent." United States v. Payton, 363 F. 2d 996 at 1000 (2d Cir. 1966) (dissenting opinion).

c.) The indictment should be dismissed because there is a high probability that with first hand testimony the Grand Jury would have not indicted the defendant.

If the United States Attorney in this case had followed the admonitions, warnings and suggestions of this Court in its many cases cited above, and presented first hand testimony with respect to the bank robbery rather than the three hearsay witnesses, that were presented, there is a high probability that the Grand Jury would have become aware of the weakness of the Government's case and refused to indict where a prima facie case may have been made out. United States v. Arcuri, 282 F. Supp. 347 at 349 (E.D.N.Y. 1968). If there is a "high probability that with eye witness rather than hearsay testimony the Grand Jury would not have indicted" then the indictment under the cases in this circuit should be dismissed. See United States v. Liebowitz, 420 F. 2d at 42; United States v. Arcuri, 282 F. Supp. 347, 350 (E.D.N.Y. 1968) (affd. 405 F. 2d 691 (2nd Cir. 1968)) and United States v. Estepa, 471 F. 2d 1132 at 1137 (2nd Cir. 1972).

In this case, if the prosecutor had called the teller to testify before the Grand Jury (Mrs. Jurek), she would have testified that she did not see anyone other than the lone robber

in the bank. (TR. 216). Mrs. Debose, if called before the Grand Jury, would have been required to admit that she could not identify the defendant Burse's picture and thought it was Maurice Burse because the F.B.I. agent had told her so (TR. 578-581). Evon Wright, if called to testify before the Grand Jury, would have advised the Grand Jury that it was Kenneth Burse who had arranged for the use of the apartment that morning (TR. 483) and that Kenneth Burse was with Spider and Maurice Burse on that morning (502-7,518-19). Barbara Ramos, would have testified that Maurice Burse ran past her near the bank on that day, but she presumably would have stated "I am not that sure" (TR. 551). Assuming that the Government could have presented before the Grand Jury, the testimony of the special agent that took the written statement from the co-defendant Debose, stating that he and two others robbed the bank, and assuming even further that some hearsay testimony would be allowed, that Debose later told him that it was Burse and Green who were involved with him, then he should also be required to tell the Grand Jury that Debose had told him that Jimmey Barner was identified by Debose as the man who robbed the bank (TR. 292).

Thus, the Grand Jury would have before them a number of things indicating the weakness of the prosecution's case against

Maurice Burse, including the fact that those seeking to identify Burse as a participant in the bank robbery were unsure of their identification (Mrs. Debose and Mrs. Ramos) that his brother Kenneth Burse was involved with Evon Wright at the apartment (402,503,518) and that the person who robbed the bank had given inconsistent statements to the F.B.I. concerning those who participated in the robbery with him. If such a presentation had been made, the Grand Jury could have "exercise[d] its judgment in refusing to indict in weak cases . . ." United States v. Arcuri, 282 F. Supp 347 at 349 (E.D.N.Y. 1968).

For all of the above reasons this Court should reverse the judgment of conviction and dismiss the indictment, thereby requiring the United States Attorney to represent its case to the Grand Jury in a manner consistent with the admonitions and warnings previously made by this Court and consistent with this Court has deemed to be procedural fairness in the exercise of its supervisory powers. As stated by a judge of this Court in another context, if the United States Attorney is required to reindict this defendant in a manner consistent with decided cases of this circuit, "the Republic will not perish", United States v. Morell, 524 F. 2d 550 at 558 (2d Cir. 1975)(Friendly J. concurring and dissenting).

CONCLUSION

For all of the reasons set forth above the conviction should be reversed and the defendant granted a new trial. Additionally, the Court should dismiss the indictment under the reasons set forth in our final point.

Buffalo, New York
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